REMARKS

Applicants respectfully request reconsideration of the present application. No new matter has been added to the present application. Claims 1-10 and 12-30 have been rejected in the Office Action. Claim 11 was previously canceled. No new claims have been added and no claims have been canceled in this Response. Accordingly, claims 1-10 and 12-30 are pending herein. Claims 1-10 and 12-30 are believed to be in condition for allowance and such favorable action is respectfully requested.

Rejections based on 35 U.S.C. § 103

A. Applicable Authority

The basic requirements of a *prima face* case of obviousness are summarized in MPEP § 2143 through § 2143.04. In order "[t]o establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success [in combining the references]. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art and not based on applicant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991)". *See* MPEP § 2143. Further, in establishing a *prima face* case of obviousness, the initial burden is placed on the Examiner. "To support the conclusion that the claimed invention is directed to obvious subject matter, either the references must expressly or impliedly suggest the claimed invention or the examiner must present a convincing line of reasoning as to why the artisan would have found the claimed invention to have been obvious in

light of the teachings of the references. *Ex parte Clapp*, 227 USPQ 972, 972, (Bd. Pat App. & Inter. 1985)." *Id. See also* MPEP § 706.02(j) and § 2142.

B. Rejections based on Rakavy and Chiu

Claims 1-9, 14-27, and 29-30 were rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 5,913,040 to Rakavy et al. (the "Rakavy reference") in view of International Publication No. WO 00/01123 (the "Chiu reference"). As the Rakavy and Chiu references, either alone or in combination, fail to teach or suggest all the claim limitations for each of claims 1-9, 14-27, and 29-30, Applicants respectfully traverse this rejection, as hereinafter set forth.

Initially, claim 1 is directed to a method of transferring a set of data over a network. The method includes monitoring the level of actual bandwidth utilization of a network connection; identifying a maximum monitored level, wherein the maximum monitored level is a maximum of the monitored level of actual bandwidth utilization of the network connection; calculating a threshold level of utilization as a function of the maximum monitored level of utilization; and if the actual level is less than the threshold level, receiving at least a portion of the set of data over the network.

Page 2 of the Office Action indicates that "Rakavy does not disclose identifying a maximum monitored level of actual utilization and that the threshold level of utilization is calculated as a function of the maximum monitored level of utilization." The Office Action relies on the Chiu reference for these limitations. However, as discussed in further detail below, Applicants respectfully submit that the Chiu reference fails to teach or suggest: (1) identifying a maximum monitored level, wherein the maximum monitored level is a maximum of the monitored level of actual bandwidth utilization of the network connection; and (2) calculating a

threshold level of utilization as a function of the maximum monitored level of utilization as recited by independent claim 1.

The Chiu reference relates to detecting and controlling network congestion. *See Chiu*, p. 5, lines 1-23. Congestion in a network is detected using two acknowledgement windows at a receiving station. *Id.* at p. 5, lines 1-4. The receiving station determines a first number of messages missing in the first acknowledged window. *Id.* The station then determines a second number of messages missing in a subsequent acknowledged window. *Id.* The station then measures congestion on the network in response to an increase between the first number of missing messages in the first acknowledgement window, and the second number of missing messages in the second acknowledgement window. *Id.* at p. 5, lines 5-7. A transmitting station then responds to messages indicating congestion on the network by reducing its transmission rate. *Id.* at p. 5, lines 9-10. By using a previously measured high rate of transmission, the transmitting station attempts to return to this measured high rate after each incident of rate reduction by adding a constant value to the reduced rate dependent on the previously measured high rate. *Id.* at p. 5, lines 9-16.

Applicants respectfully submit that the Chiu reference fails to teach or suggest identifying a maximum monitored level, wherein the maximum monitored level is a maximum of the monitored level of actual network bandwidth utilization as recited by independent claim 1. The Office Action indicated for this limitation that the Chiu reference discusses a previously measured high rate of transmission for a transmitting station. *See Office Action*, p. 3. However, Applicants submit that that using a previously measured high rate of transmission as discussed in the Chiu reference is different from identifying a maximum monitored level, wherein the maximum monitored level is a maximum of the monitored level of actual network bandwidth

utilization as recited in independent claim 1. A rate of transmission is fundamentally different from a level of bandwidth utilization.

In addition, the Chiu reference fails to teach or suggest calculating a threshold level of utilization as a function of the maximum monitored level of utilization as recited by independent claim 1. The threshold level of utilization is a level below which data may be transferred. *See, e.g., Application*, p. 12 line 10 to p. 13, line 8. As recited by independent claim 1, the method includes receiving at least a portion of a set of data over the network if the actual level of utilization is less than the threshold level of utilization. The Chiu reference discusses increasing a transmission rate from a reduced transmission rate (which was reduced as a result of network congestion defined by packet loss) to a previously measured high rate of transmission by adding a constant value to the transmission rate in a number of steps. Applicants respectfully submit that increasing from a reduced rate to a previously high rate of transmission is vastly different from calculating a threshold level of utilization below which data may be transferred.

Accordingly, it is respectfully submitted that the Rakavy and Chiu references, either alone or in combination, fail to teach or suggest all of the limitations of independent claim 1 and, thus, a *prima facie* case of obviousness cannot be established for this claim based upon these references. Applicants respectfully request withdrawal of the 35 U.S.C. § 103(a) rejection of independent claim 1.

Independent claims 22 and 25 were rejected in the Office Action for similar reasons as stated for independent claim 1. Independent claim 22, which is directed to a data structure stored on a computer-readable medium, recites "a first data field containing data representing a maximum monitored level, wherein the maximum monitored level is a maximum of a monitored level of actual network bandwidth utilization," and a second data file which "is

derived from said data field by calculating the threshold level as a function of the maximum monitored level." Likewise, independent claim 25 is directed to a computer-readable medium having computer-executable components including a bandwidth monitoring component which "identifies a maximum monitored level, wherein the maximum monitored level is a maximum of the monitored level of actual bandwidth utilization for the network connection," and "a threshold calculating component which calculates a threshold level of utilization as a function of the maximum monitored level of utilization identified by said bandwidth monitoring components." These two limitations in each of independent claims 22 and 25 are similar to the "identifying a maximum monitored level" and "calculating a threshold level" limitations of claim 1. Thus, for at least the reasons stated above with respect to claim 1, Applicants respectfully submit that Rakavy and Chiu fails to teach or suggest all the limitations of independent claims 22 and 25, and thus, a *prima face* case of obviousness has not been established for these claims. Accordingly, withdrawal of the 35 U.S.C. § 103(a) rejection of claims 22 and 25 is respectfully requested.

Each of claims 2-9, 14-21, 29, and 30 depends, either directly or indirectly, from independent claim 1, and accordingly, these claims are believed to be in condition for allowance for at least the above-cited reasons. In addition, each of claims 23 and 24 depends, either directly or indirectly, from independent claim 22, and accordingly, these claims are believed to be in condition for allowance for at least the above-cited reasons. Further, each of claims 26 and 27 depends, either directly or indirectly, from independent claim 25, and accordingly, these claims are believed to be in condition for allowance for at least the above-cited reasons. As such, Applicants respectfully request withdrawal of the 35 U.S.C. § 103(a) rejections of dependent claims 2-9, 14-21, 23, 24, 26, 27, 29, and 30.

C. Rejections based on Rakavy, Chiu, and Watanabe

Claim 10 was rejected under 35 U.S.C. § 103(a) as being unpatentable over the Rakavy reference in view of the Chiu reference and further in view of U.S. Patent No. 6,285,662 to Watanabe et al. (the "Watanabe reference"). Applicants respectfully submit that a *prima facie* case of obviousness has not been established because the Rakavy, Chiu, and Watanabe references, either alone or in combination, fail to teach or suggest all of the claim limitations for claim 10. Dependent claim 10 depends indirectly from independent claim 1. The Office Action appears to rely on the Rakavy and Chiu references (and not the Watanabe reference) for the limitations from this base claim. Applicants respectfully submit that the Rakavy and Chiu references fail to teach or suggest all of the limitations from claim 1 for at least the reasons cited above. Accordingly, Applicants respectfully request withdrawal of the 35 U.S.C. § 103(a) rejection of dependent claim 10.

D. Rejection based on Rakavy, Chiu, and Elzur

Claim 12 was rejected under 35 U.S.C. § 103(a) as being unpatentable over the Rakavy reference in view of the Chiu reference and further in view of U.S. Patent No. 6,427,169 to Elzur et al. (the "Elzur reference"). Applicants respectfully submit that a *prima facie* case of obviousness has not been established because the Rakavy, Chiu, and Elzur references, either alone or in combination, fail to teach or suggest all of the claim limitations for claim 12. Dependent claim 12 depends indirectly from independent claim 1. The Office Action appears to rely on the Rakavy and Chiu references (and not the Elzur reference) for the limitations from this base claim. Applicants respectfully submit that the Rakavy and Chiu references fail to teach or suggest all of the limitations from claim 1 for at least the reasons cited above. Accordingly, Applicants respectfully request withdrawal of the 35 U.S.C. § 103(a) rejection of dependent claim 12.

E. Rejection based on Rakavy, Chiu, and Kalkunte

Claim 13 was rejected under 35 U.S.C. § 103(a) as being unpatentable over the Rakavy reference in view of the Chiu reference and further in view of U.S. Patent No. 6,078,591 to Kalkunte et al. (the "Kalkunte reference"). Applicants respectfully submit that a *prima facie* case of obviousness has not been established because the Rakavy, Chiu, and Kalkunte references, either alone or in combination, fail to teach or suggest all of the claim limitations for claim 13. Dependent claim 13 depends indirectly from independent claim 1. The Office Action appears to rely on the Rakavy and Chiu references (and not the Watanabe reference) for the limitations from this base claim. Applicants respectfully submit that the Rakavy and Chiu references fail to teach or suggest all of the limitations from claim 1 for at least the reasons cited above. Accordingly, Applicants respectfully request withdrawal of the 35 U.S.C. § 103(a) rejection of dependent claim 13.

F. Rejection based on Rakavy, Chiu, and Buch

Independent claim 28 stands rejected under 35 U.S.C. § 103(a) as unpatentable over U.S. Patent No. 6,463,468 to Buch et al. (the "Buch reference") in view of the Rakavy reference in view of the Chiu reference. The Buch reference discloses a technique for free Internet access which involves a method for downloading video advertising files when a user is not actively using the bandwidth of the Internet connection. As shown in FIG. 11 and described at column 12, Buch's method determines the ad block size based on the available data rate and perhaps also based on system resources. If the Internet connection is being used (e.g., to download content or to send/receive email), the method checks the availability of the connection again later. However, if the Internet connection is not being used, a request is sent to the ad server for information such as the file name, the offset from the file start where the block should be downloaded, and the determined ad block size. As discussed below, Applicants respectfully

submit that claim 28 is patentable over the proposed combination of the Buch, Rakavy and Chiu references.

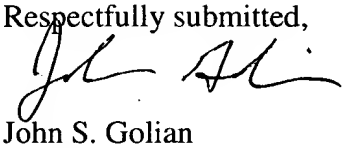
Independent claim 28 recites: "the actual network bandwidth utilization is less than a threshold level below which data may be transferred over the network without interfering with other network activity, wherein the threshold level is calculated as a function of a maximum monitored level, and wherein the maximum monitored level is a maximum of the monitored level of actual network bandwidth utilization." The Office Action admits at page 11 that "Buch does not disclose that the threshold level is calculated as a function of a maximum monitored level of actual network bandwidth utilization," and thus the Office Action relies on the Rakavy and Chiu references for the missing limitation. However, the missing limitation of claim 28 is similar to the corresponding language in independent claims 1, 22 and 25, so claim 28 is patentable over the combination of the Rakavy and Chiu references for at least the reasons discussed above with respect to claims 1, 22 and 25.

Thus, there is no teaching or suggestion in the Buch, Rakavy, and Chiu references, either individually or in combination, to calculate a threshold level as a function of a maximum monitored level of utilization as required by claim 28. Therefore, the proposed combination of the Buch, Rakavy and Chiu references would not achieve the method of clam 28. Moreover, there is no suggestion from the prior art to modify the combined teachings of the Buch, Rakavy and Chiu references to achieve the method of claim 28. For at least the reasons stated above, it is respectfully submitted that the Buch, Rakavy, and Chiu references fail to teach or suggest all of the limitations of claim 28, and thus, a *prima facie* case of obviousness has not been established for this claim. Accordingly, withdrawal of the 35 U.S.C. § 103(a) rejection of claim 28 is respectfully requested.

CONCLUSION

For at least the reasons stated above, claims 1-10 and 12-30 are in condition for allowance. Applicants respectfully request withdrawal of the pending rejections and allowance of claims 1-10 and 12-30. If any issues remain that would prevent issuance of this application, the Examiner is urged to contact the undersigned by telephone prior to issuing a subsequent action. It is believed that no fee is due in conjunction with the present response. However, if this belief is in error, the Commissioner is hereby authorized to charge any amount required to Deposit Account No. 19-2112.

Respectfully submitted,



John S. Golian
Reg. No. 54,702

SHOOK, HARDY & BACON L.L.P.
2555 Grand Blvd.
Kansas City, MO 64108-2613
816-474-6550